



San Diego City Attorney **CASEY GWINN**

NEWS RELEASE

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LET THE VOTERS DECIDE THE FUTURE OF THE MT. SOLEDAD CROSS PROPERTY

*Recommendation by City Attorney includes preserving the
Mt. Soledad War Memorial Association's new improvements atop Mt. Soledad*

San Diego, CA: After a thorough legal analysis, City Attorney Casey Gwinn today recommended a new public vote to decide the future of the 50-year-old concrete cross on Mt. Soledad. The City Attorney is proposing a new public vote and, if the vote passes, a new high-bid process to find a private property owner who will determine whether the cross stays or the cross goes.

"Plaintiff Philip Paulson, the American Civil Liberties Union, or the Ninth Circuit should not decide the future of this historic war memorial," said City Attorney Casey Gwinn. "The voters and taxpayers of San Diego have a right to weigh in on the future of this cross. That is why I am recommending a new public vote and then, if the vote passes, a new public sale. Whether the cross comes or goes should be decided by a private property owner, not by the City of San Diego."

The recommendation to rescind the last sale and conduct a new sale of the property will be presented to the City Council on July 20 by the City Attorney. The City Attorney's proposal will also preserve the Mt. Soledad War Memorial Association's current memorial walls and related improvements by providing for a long term lease at fair-market value between the Association and the City for the land the Association purchased in 1998. The new lease should specify that the Association has no rights to the cross should a subsequent purchaser of the land want to remove the cross. In that case, the City would bear the costs of removing the cross.

"Many have strong feelings about saving the cross and many have strong feelings about removing the cross," said Gwinn. "But the job of the City Attorney is to honor the right of the voters to weigh in on this

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sensitive issue and to handle the competing constitutional rights of all parties fairly and legally. The best way to resolve this issue given the rulings of the Ninth Circuit is to protect the Association's improvements even while letting a new private property owner decide whether to keep the cross up or take the cross down."

If the City Council adopts the recommendation, a proposition authorizing this new sale of Mt. Soledad property will be placed on the November ballot. It will require approval by two-thirds of the voters in the November 2004 election. Any new purchaser of the property would take title subject to a lease the City Attorney will execute with the Association to protect the current improvements. The lease, to be executed before a public vote, would not protect or include the cross. If the voters support the City Attorney's approach, a new high-bid process would select an owner who will decide whether the cross stays or goes.

"Fourteen federal judges have weighed in on these legal issues in the last four years. Seven have agreed with the City and seven have disagreed with the City," said Gwinn. "It is appropriate then to try to resolve these complex issues once and for all with a new public vote and new sale."

Background:

If the new ballot measure passes and a new sale is executed, the City of San Diego will finally resolve the long legal battle that was first initiated by plaintiff Phillip Paulson. In 1989, Paulson brought suit in the District Court complaining the presence of the cross on City property violated provisions in both the United States and the California Constitutions. The District Court ruled the presence of the cross on City property violated the California Constitution and issued a permanent injunction forbidding the existence of the cross on public property.

As a remedy, the City Council voted to sell to the Association a small area of the parkland immediately surrounding the cross. As required by the Charter, the City Council placed Proposition F on the June 1992 ballot to obtain voter approval of this sale of public parkland. San Diego voters approved Proposition F by over 76 percent and the City subsequently sold the 222 square foot parcel immediately beneath the cross to the Association.

Plaintiff Paulson objected to the sale and moved the District Court to enforce the injunction. The District Court voided the 1994 sale in September 1997, finding it violated the California Constitution. The City subsequently conducted a second sale of one-half acre of land surrounding the cross. The City solicited public bids "for the purpose of maintaining an historic war memorial."

The Association made the highest bid of \$106,000, took title to the property in 1998, and, in 1999,

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commenced an improvement program. Paulson objected that the terms of the second sale also violated the United States and the California Constitutions. This time, the District Court, upheld the sale and found the City had acted properly and legally. Plaintiff Paulson appealed to the Court of Appeals for the Ninth Circuit, which unanimously rejected Plaintiff's arguments. In a 3-0 decision authored by Senior Presiding Judge Proctor Hug, the Ninth Circuit panel found the City had acted properly in conducting a new sale of the property. Paulson then requested an *en banc* panel of eleven judges to review the decision upholding the sale. *En banc* hearings are extremely rare, but in this instance, such a hearing was conducted. On June 26, 2002, the *en banc* panel voted 7-4 to reverse the decision of the District Court.

Last year, the U.S. Supreme Court declined to hear the City's appeal, allowing the Ninth Circuit Court of Appeals *en banc* ruling to stand. The *en banc* ruling voids both the sale of Mt. Soledad property to the Mt. Soledad War Memorial Association and the land deed to the Association. Therefore, the remedy is complicated. It requires the City to rescind the sale to the Association and resell the land surrounding the cross to the highest bidder. Rescission of the contract will also obligate the City to reimburse the Association the \$106,000 purchase price of the property.

In its ruling, the Ninth Circuit Court stated that the City's second sale of public land surrounding the Mt. Soledad Cross violated the California Constitution because the manner of the sale provided financial benefit to parties who intended to maintain the cross on the property. In its ruling, the Ninth Circuit Court left it up to the parties and the District Court to devise "a remedy for the constitutional violation."

History of the Mt. Soledad Cross:

The first cross on Mt. Soledad was constructed of redwood in 1913. Three years later, the City Council dedicated the property as a public park. Vandals destroyed the cross in 1923, and strong winds destroyed its wood-stucco replacement in 1952. Later that year, the City Council authorized the Association to erect the present cross which is constructed of reinforced concrete. In 1954, the Association dedicated the cross as a memorial to veterans of World War I, World War II, and the Korean War. The memorial now consists of extensive landscaping and walls of granite plaques engraved with the names and photographs of veterans of various wars. Today, over 1500 plaques honoring 3000 veterans grace the granite walls of the Mt. Soledad War Memorial. To date, the Association has spent over \$900,000 on the Mt. Soledad property.

"The Association has built a world-class memorial honoring military veterans and it must be protected and preserved," said Gwinn.

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Public Hearing Set:

Mayor Dick Murphy has scheduled a public hearing of the City Council on the Mt. Soledad cross issue for July 20, 2004 at 10 a.m. You can obtain a copy of the City Attorney's Mt. Soledad report to City Council by visiting www.sandiegocityattorney.org and "click" Priorities and Initiatives." The public may also participate in the poll survey related to the City Attorney's recommendation.

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